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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1203

VICTOR MADERA, RAMIRO MADERA, MANUELA MADERA, and all other persons similarly situated,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF NEW YORK, BERNARD E. DONOVAN as Superintendent of Schools of the City of New York, THERESA RAKOW as District Superintendent of Public Schools for District One in the City of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

	PAGE
Statement	1
Question Presented	2
Facts	3
The Decisions Below	6
POINT I—The nature of the guidance conference is informal and not adversary. Legal counsel under these circumstances is not required	8
POINT II—The exclusion of attorneys from participation in a guidance conferences does not violate the requirements of due process of law	10
A. Guidance conference procedure	10
B. The requirements of due process	11
C. There is no due process requirement for counsel at an informal proceeding such as a suspension guidance conference	13
D. Review proceeding available to set aside the results of a guidance conference	14
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Application of Olson, 40 Misc 2d 246, 242 N.Y.S. 2d 1002 (1963)	15
Cafeteria and Restaurant Workers Union v. *McElroy,* 367 U. S. 886, 81 S. Ct. 1743, 6 L. ed. 2d 1230	

PAGE

(1961) 12

Cosme v. *Board of Education*, 50 Misc 2d 344, 270 N.Y.S. 2d 231 (1966) 16

Escobedo v. *Illinois*, 378 U. S. 478, 84 S. Ct. 1758, 12 L. ed. 2d 977 (1964) 14

Escoe v. *Zerbst*, 259 U. S. 490, 55 S. Ct. 818, 79 L. ed. 1566 (1935) 12

Garrity v. *New Jersey*, 385 U. S. 493, 87 S. Ct. 616, 16 L. ed. 2d 205 (1967) 14

Hannah v. *Larche*, 363 U. S. 420, 80 S. Ct. 1502, 4 L. ed. 2d 1307 (1960) 12

In re Gault, 387 U. S. 1, 87 S. Ct. 1428, 18 L. ed. 2d 527 (1967) 11

In re Groban, 352 U. S. 330, 77 S. Ct. 510, 1 L. ed. 2d 376 (1957) 13, 16

Kent v. *United States*, 383 U. S. 541, 86 S. Ct. 1045, 16 L. ed. 2d 84 (1966) 11

Matter of Sheffel, 73 N. Y. St. Dept. Rep. 104 15

Matter of Yonkes, 78 N. Y. St. Dept. Rep. 66 15

Miranda v. *Arizona*, 384 U. S. 436, 86 S. Ct. 1602, 16 L. ed. 2d 694 (1966) 14

O'Brien v. *Commissioner of Education*, 4 N Y 2d 140, 173 N.Y.S. 2d 265, 149 N. E. 2d 705 (1958) 15

Palko v. *Connecticut*, 302 U. S. 319, 58 S. Ct. 149, 82 L. ed. 288 (1937) 13

Powell v. *Alabama*, 287 U. S. 45, 53 S. Ct. 55, 77 L. ed. 158 (1932) 13

Prentiss v. *Atlantic Coast Line*, 211 U. S. 210, 29 S. Ct. 67, 53 L. ed. 150 (1908) 12

PAGE

Reaves v. *Ainsworth*, 219 U. S. 296, 31 S. Ct. 230, 55 L. ed. 225 (1911) 12

Spevack v. *Klein*, 385 U. S. 511, 87 S. Ct. 625, 17 L. ed. 2d 574 (1967) 14

Statutes:

New York Education Law sec. 310 .....14, 15

New York Education Law sec. 311 .....14, 15

New York Education Law sec. 3214 14

New York Family Court Act sec. 741 14

New York Family Court Act sec. 744 14

New York Family Court Act sec. 758 14

New York Civil Practice Law and Rules, Article 78 (§§ 7801-7806) 16

Rules and Procedure:

New York City Board of Education, General Circular No. 16 4

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Statement

Petitioners seek a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit entered on December 6, 1967. That judgment unanimously reversed a judgment of the United States District Court for the Southern District of New York (MOTLEY, J.), vacated an injunction granted in that court and dismissed the complaint.

Question Presented

Every school system must face the problem presented by children who fail to make an adequate emotional adjustment to the requirements of group education. Disruptive behaviour by one child can halt the education of an entire class. Victor Madera became a behaviour problem to the point where his principal suspended him and referred the question of Victor's educational difficulty to the District Superintendent. Victor and his parents were requested to attend a guidanee conference where, with the aid of an advisor of their choice, they could discuss Victor's problems with school officials and plan the next phase of his education. The Board of Education does not consider the conference to be adversary in nature and, hence, does not include attorneys among those invited to attend. Social workers, psychologists or religious counsellors would be welcomed to assist the student and his parents in the conference. The object of the conference is to find an answer to the student's behavioral problem and provide an educational environment where he can progress, more effectively.

As a result of the conference the following decisions may be reached: (1) the student may be reinstated in the same school, (2) he may be transferred to another school of the same type, (3) with his parents' consent, he may be transferred to a special school for socially maladjusted children, (4) the student may be referred to the Bureau of Child Guidance for psychiatric or psychological assistance or to some other social agency for study and recommendation, or (5) where truancy is in question, the matter may be referred to the Bureau of Attendance for court action.

The parents of Victor Madera asked to be represented by an attorney when they were requested to attend a conference with school officials concerning their son. In accord with the policy of the Board of Education that the

conference should not be adversary in form or substance, the request was denied.

Thus the question is posed: Do students and parents have a constitutional right to be represented by counsel at a guidance conference?

Facts

When this proceeding was commenced in the United States District Court for the Southern District of New York, petitioner Victor Madera was a 14-year-old student in the seventh grade in Junior High School No. 22, District No. 1 of the New York City public school system. Victor had experienced serious behavioral difficulties in school over a period of more than a year (R94-98).*

Ultimately, Victor's principal decided that suspension was warranted. The principal of a school is authorized to suspend a pupil for a period of not more than five days during which time he reports the child's status to the District Superintendent, his superior. If the child is not restored to regular classes within the five-day period, it is the obligation of the District Superintendent to schedule a Guidance Conference for the purpose of considering the status of the child and making a determination as to the appropriate educational assignment deemed best in the light of the personal needs and abilities of the student (R70-81).

In this case, pursuant to the regular practice, the parents were notified to attend a conference in the District Superintendent's office. They sought legal counsel, and petitioners' present counsel, the legal division of Mobilization For Youth, asked to appear on behalf of Mr. and Mrs. Madera and their son. This request was denied in accord-

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* Unless otherwise stated all numbers in parentheses refer to pages in the Record filed with the United States Court of Appeals for the Second Circuit.

ance with the provisions of Circular No. 16, dated April 18, 1966, which sets forth the procedure to be followed by District School Superintendents in conducting guidance conferences for suspended students (R70-80). Plaintiffs then sought and obtained an injunction from the District Court staying the guidance conference until the question of their right to counsel could be determined.*

Counsel are precluded from attending guidance conferences for policy reasons set forth in Circular No. 16 as follows:

> "Inasmuch as this is a guidance conference for the purpose of providing an opportunity for parents, teachers, counselors, supervisors, et al. to plan educationally for the benefit of the child, attorneys seeking to represent the parent or the child may not participate." (App. c of Petition, 74a)

The participation of the parents, however, is most desirable. The Circular states, "Every effort should be made to secure the parent's attendance" (*Id.* at 75a). In addition, the parents may be accompanied and assisted by persons of their choosing including social workers, friends, translators, etc., so long as those persons are not attorneys.

As a result of the conference the district superintendent may reinstate the student in his same school, transfer him to another school, refer him for placement in a school for socially maladjusted children, refer him to the Bureau of Child Guidance or other suitable agency for study and recommendations, including medical suspension, home instruction, exemption or, where truancy is a problem, refer him to the Bureau of Attendance for court action (R79).

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* Because of the injunction and the subsequent appeal, in order to make sure that Victor Madera's education was continued, he was first put on home instruction and later transferred to another school of the same type as the one in which he was originally enrolled.

The Bureau of Child Guidance is the clinical arm of the school board and is brought into use when professional psychological or psychiatric assistance in diagnosis appears helpful (R230-251).

The Bureau of Attendance acts in cases of truancy to see that children and parents comply with the compulsory attendance provisions of the Education Law (R251-257, 281-285).

It should be noted that district superintendents do not have power to exempt a child from attending school; this is reserved to the Superintendent of Schools and is rarely used (R79, 81, 224).

The purpose of the guidance conference was set forth in the affidavit of Bernard E. Donovan, Superintendent of Schools, as follows:

> "The sole purpose of the conference is to study the facts and circumstances surrounding the temporary suspension of this student by his school principal, and to place the child in a more productive educational situation. At these conferences the assistant superintendent interviews the child, his parents and school personnel to learn the cause of the child's behavior. The conference is conducted in an atmosphere of understanding and cooperation, in a joint effort involving the parent, the school, guidance personnel and community and religious agencies. There is never any element of the punitive, but rather an emphasis on finding a solution to the problem.
>
> After a full and careful study and discussion a plan is formulated to deal more adequately with the problems presented by the child. Every effort is bent towards the maintenance of a guidance approach. The emphasis is on returning the child as rapidly as possible to an educational setting calculated to be most useful to him." (R89-90)

No one within the entire structure of the Board of Education has the power to deprive a child of his freedom by confinement or commitment to an institution (R90, 242, 245, 247, 249, 250, 300, 322). Such matters are left to the courts where the right of counsel is not questioned.

The Decisions Below

The essence of the District Court's decision was expressed as follows (41a-42a):

> "As a result of a review of the testimony, exhibits and records produced by the District Superintendent, this court finds that a 'Guidance Conference' can ultimately result in loss of personal liberty to a child or in a suspension which is the functional equivalent of his expulsion from the public schools or in a withdrawal of his right to attend the public schools.
>
> This court also finds that as a result of a 'Guidance Conference', adult plaintiffs may be in jeopardy of being proceeded against in a child neglect proceeding in the Family Court.
>
> For the foregoing reasons, this court concludes that the due process clause of the Fourteenth Amendment to the Federal Constitution is applicable to a District Superintendent's Guidance Conference. More specifically, this court concludes that enforcement by defendants of the 'no attorneys provision' of Circular No. 16 deprives plaintiffs of their right to a hearing in a state initiated proceeding which puts in jeopardy the minor plaintiff's liberty and right to attend the public schools."

In reversing the District Court the Circuit Court stated (23a-24a):

> "The conference is not a judicial or even a quasi-judicial hearing. Neither the child nor his parents

are being accused. In saying that the provision against the presence of an attorney for the pupil in a District Superintendent's Guidance Conference 'results in depriving plaintiffs of their constitutionally protected right to a hearing' (267 F. Supp. at 373), the trial court misconceives the function of the conference and the role which the participants therein play with respect to the education and the welfare of the child. Law and order in the classroom should be the responsibility of our respective educational systems. The courts should not usurp this function and turn disciplinary problems, involving suspensions, into criminal adversary proceedings—which they definitely are not. The rules, regulations, procedures and practices disclosed on this record evince a high regard for the best interest and welfare of the child. The courts would do well to recognize this."

[NOTE: In their appeal to the Circuit Court the respondents raised issues relating to the conduct of the trial and rulings of the District Court as follows:

1. The District Court refused to permit counsel for defendant to inspect Court's Exhibit 21, a student's suspense file, for purposes of cross-examining a witness who had described the exhibit at length in response to questions by the Court (R274-275).

2. After the trial was over, the District Court, on its own motion, added 23 new exhibits (also suspense files) to the record without affording defendants an opportunity to object to their introduction or to examine witnesses concerning them (R47).

3. On the last day of trial, at the close of plaintiffs' case, the District Court granted plaintiffs' motion to convert the suit into a class action. The class was never

adequately defined nor was there any notice given to any member of the class however defined (R317, 319).

In light of the decision by the Circuit Court it was unnecessary for these matters to be ruled upon. However, should this Court grant certiorari in this case, respondents wish to preserve their rights to present all issues raised on their appeal to the Circuit Court.]

POINT I

The nature of the guidance conference is informal and not adversary. Legal counsel under these circumstances is not required.

Petitioners stress the problems facing the urban poor community and the effective assistance provided by organizations such as Mobilization for Youth. They conclude however that the unique skills of an attorney become necessary in a non-adversary meeting—a guidance conference—even though the same organization could and in fact does have social workers who are welcome to attend. Their argument assumes that the interests of the school system and the children in it are adverse. They disregard one of the basic postulates of public school education—that teachers, counsellors, students and parents are mutually interdependent and should work cooperatively toward the goals of education for all children. There is nothing in the training of attorneys that makes them uniquely qualified to assist in this process.

There are about 28,000 children in Victor Madera's school district. Of these, about 150 were suspended pending appropriate action pursuant to the district superintendent's guidance conference in the past two years. Some of these students moved away, were unable for medical reasons to resume their education or passed the age for compulsory education and did not wish to resume. For

the great majority, however, the suspension was a temporary interruption but not a termination of their education.

The loss of education, of course, for even one student is regrettable. Unfortunately, however, there are a few students that do not adjust to school environment, even with extensive professional help. The percentage of students for whom a guidance conference becomes necessary is small. The percentage of those who do not return to a class as a result of action taken at a guidance conference is extremely small compared to the student body as a whole.

Respondents do not suggest, however, that the answers to the questions raised here can be found in the statistics of pupil suspensions. Rather it is the nature of the educational process and the proper relation between the schools and the pupils that must be considered in the search for a solution. These factors are in areas of policy where precedent is not conclusive. If incarceration were truly the question, as suggested by the district court below (41a), the answer would be simpler. The district superintendent, however, has no power to confine the child—this power is reserved to the courts. Nor does the district superintendent have power to adjudicate any charges against the parents. This too is reserved for the courts.

The professional competence needed to deal wisely and fairly with suspended students is found in various disciplines including education, guidance counselling, social work, psychology and psychiatry. The implications of this suit are that the members of the Board of Education's staff, professionally trained in these areas, are in reality opposed in interest to the students they are attempting to instruct or assist. On this assumption petitioners claim a lawyer is essential at the guidance conference to defend the suspended child. This approach will not help either the child or the school.

The exclusion of lawyers is based on both practical and policy considerations growing out of the need for decisions to be made by people properly trained and authorized to make them and the belief that educational values will suffer in an adversary proceeding.

While this case tends to focus solely on the individual child on suspension, the needs of the student body as a whole should not be ignored. A disturbed, disruptive child needs help, but those in classes with him, including his teachers, also have rights, and these include the right to go about their work without excessive disturbances or threats to their safety. This does not mean that respondents claim the right to ignore the needs of difficult children. The record here shows the varied and extensive facilities and professional services set up solely to assist them.

Under the present system if the educators fail and reach an arbitrary or unwarranted decision, the student is not without relief. There can be appeals to the Commissioner of Education or a review by an Article 78 proceeding in the Supreme Court of New York—both with the right of counsel. In this way errors can be corrected, when a right to relief is shown, without taking over the internal operations of the schools.

Due process requires no more than the right of counsel where appropriate. There is no showing that counsel at a guidance conference is required.

POINT II

The exclusion of attorneys from participation in a guidance conference does not violate the requirements of due process of law.

A. Guidance conference procedure.

The day a student is suspended by the principal a letter is sent to his parents notifying them of the suspension and

advising them that a guidance conference will be held soon thereafter (R168). A copy of the principal's letter is also sent to the Assistant Superintendent, who then sends a letter to the parents notifying them of the date of the conference and asking them to be present. (See Appendix C, 68a-77a.) At the conference, as District Superintendent Rakow testified:

> "No decision is made until the parent and child have participated." (R228)

Not only are great efforts made to have the parents appear, but they may bring with them social workers familiar with the situation and a translator if necessary. The Board also will supply a translator if advised that the parents do not speak English. The conference, in short, is an attempt by qualified educators and guidance counsellors, working together with a child, his parents and interested outside social workers, to find the best educational answer for a student with a behavioral problem.

The Court of Appeals correctly distinguished between judicial due process required at formal proceedings and the non-judicial due process required in an informal proceeding such as a guidance conference.

B. The requirements of due process.

The essentials of due process required in a criminal or civil judicial proceeding are well established and include at least the following: (1) proper notice, (2) an impartial hearing, (3) the right to confront and cross-examine adverse witnesses, (4) the right to summon witnesses and offer evidence, (5) the privilege against self incrimination, and (6) the right to be represented by counsel. This is especially so where the proceedings may terminate in incarceration. *In Re Gault,* 387 U. S. 1 (1967); *Kent* v. *United States,* 383 U. S. 541 (1966). The question is

whether such requirements must be included in an informal guidance conference where the purpose of the conference is to determine how best to meet the educational needs of the pupil.

It is axiomatic that "the requirements of due process frequently vary with the proceeding involved . . ." *Hannah* v. *Larche,* 363 U. S. 420, 440 (1960), and "what is due process of law must be determined by circumstances." (*Reaves* v. *Ainsworth,* 219 U. S. 296, 304 [1911].)

There is a clear distinction between a judicial hearing and an informal proceeding. "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end." (*Prentiss* v. *Atlantic Coast Line,* 211 U. S. 210, 226 [1908].) Where, however, the occasion calls for a proceeding less formal than a judicial inquiry, it should "be so fitted in its range to the needs of the occasion." (*Escoe* v. *Zerbst,* 295 U. S. 490, 493 [1935].)

As this Court declared in *Cafeteria and Restaurant Workers Union* v. *McElroy,* 367 U. S. 886, 894-895 (1961):

> "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest. * * * The very nature of due process negates any concept of inflexible procedures applicable to every imaginable situation. [citations omitted] ' "[D]ue process", unlike some legal rules is not a technical conception with fixed content unrelated to time, place and circumstances.' It is 'compounded of history, reason, the past course of decisions * * *.' *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 162-163 (concurring opinion)."

C. There is no due process requirement for counsel at an informal proceeding such as a suspension guidance conference.

Informal proceedings on matters of importance under many conditions comply with the requirements of "due process" without representation by counsel.

The need for counsel varies with the nature of the proceeding. *In re Groban,* 352 U. S. 330 (1957).

Where due process does require counsel it is because "the benefit of counsel . . . [is] essential to the substance of the hearing." *Palko* v. *Connecticut,* 302 U. S. 319, 327 (1937). The nature of the proceeding must determine whether "under the circumstances the necessity of counsel . . . [is] vital and imperative . . ." *Powell* v. *Alabama,* 287 U. S. 45, 71 (1932). The Court here must look to the substance of the proceeding to determine if the student "requires the guiding hand of counsel at every step in the proceeding . . ." *Powell* v. *Alabama, supra,* 287 U. S. at p. 69.

Is there a need for the attorney's skills at the guidance conference? There is no adversary. No attorney is present for the Board of Education. There is no prosecutor, no judge, no jury and there are no complex rules of procedure. *Cf. Powell* v. *Alabama, supra.* There are no witnesses to be examined under oath. Formal rules of evidence are not applied. None of these, however, are essential to a concept of fundamental fairness under the circumstances. To hold that the right of representation by counsel is essential must eventually involve the federal courts in a continuing and expanding supervision of the guidance conference to determine, at each juncture, whether, and which specifics of the Fifth and Sixth Amendments are also essential.

If the professional conclusion is that the student should be transferred to a parental school or to an institution

either for reason of physical or mental health or other reasons, the transfer may only be accomplished with the consent of the parents or by court order.*

No school official has this authority (Education Law § 3214). At this stage the parent may refuse such consent in which event the child may not be transferred without a judicial proceeding in the Family Court (Family Court Act § 758). The right to representation by counsel is guaranteed at that proceeding (*id.*, § 741), and the Court may consider no evidence that is not "competent, material and relevant . . ." (*id.*, § 744). In addition, as pointed out in the Circuit Court decision (8a), it is clear that statements made by the student or his parents at the guidance conference could not be introduced into evidence in any subsequent court proceedings. *Cf. Garrity* v. *New Jersey*, 385 U. S. 493 (1967); *Spevack* v. *Klein*, 385 U. S. 511 (1967); *Miranda* v. *Arizona*, 384 U. S. 436 (1966); *Escobedo* v. *Illinois*, 378 U. S. 478 (1964).

Thus, it appears that neither actual need nor due process requires representation by counsel at the guidance conference. Lawyers are usually not trained as social workers, educators, guidance counselors or psychologists. If the guidance conference should be turned into an adversary proceeding, a lawyer should attend, perhaps for both "sides," and hearing officers should be appointed to preside and make the necessary rulings. Respondents believe this approach is both unnecessary and unwise when viewed from the point of view of the student, his parents or the school system.

D. Review proceedings are available to set aside the results of a guidance conference.

Sections 310 and 311 of the New York Education Law provide for a review on appeal to the Commissioner of

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* Of course, prior to determining whether to consent or not the parent may seek the advice of counsel.

Education in the case of any child or parent aggrieved by the actions of any school authority including cases where a child is suspended.

Pursuant to Section 310 the Commissioner of Education has heard a number of cases involving the suspension of students from school. *Matter of Sheffel,* 73 N. Y. St. Dept. Rep. 104; *Matter of Yonkes,* 78 N. Y. St. Dept. Rep. 66; *Application of Olson,* 40 Misc 2d 246, 242 N.Y.S. 2d 1002, 1003 (Sup. Ct., Nassau Co., 1963). At hearings dealing with suspension of a student from class which may involve disputed issues of fact, the Commissioner of Education would be required to conduct a judicial hearing "according to procedure which satisfied the rudiments of due process of law . . ." *O'Brien* v. *Commissioner of Education,* 4 N Y 2d 140, 146, 149 N. E. 2d 705 (1958) (concurring opinion of Judge Van Voorhis). Thus, at that hearing the student and his parents have the right to be represented by counsel. Prior to or during the hearing the Commissioner could stay the suspension or other action of the school authorities (Education Law § 311 [2]).* Following the hearing he may "make all orders . . . which may, in his judgment be proper or necessary to give effect to his decision" (Education Law § 311 [4]).

The fact that a formal hearing with counsel is afforded by the Commissioner and not at the guidance conference does not violate due process.

Where, as here, the guidance conference gives the student notice and a full opportunity to be heard in an informal non-judicial setting and where there is a statutory system for a petition or appeal to the Commissioner of Education with all the safeguards of a judicial proceeding,

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* While rightfully concerned that some students remained suspended for lengthy periods of time, the petitioners and the District Court fail to recognize that by petition or appeal to the Commissioner of Education the student may obtain a stay of the suspension pending the Commissioner's determination.

representation by counsel should not be required at the conference. The presence of an attorney could in fact "so far encumber the . . . proceeding as to make it unworkable or unwieldy" (*In re Groban, supra,* at p. 334), and obstruct the very aim of the guidance conference which is to provide for the continuing education of the student.

As an alternative to an appeal to the Commissioner of Education, a person aggrieved by acts of the Board of Education may have a prompt review in the New York State Supreme Court in an Article 78 proceeding (New York Civil Practice Law and Rules, Section 7801-7806).

An Article 78 proceeding may be, and frequently is, commenced by service of an order to show cause and a petition. The court, of course, may include a stay of administrative action pending determination of the matter by the court.

This procedure was followed in a suspense case very similar to this. *Cosme* v. *Board of Education,* 50 Misc 2d 344, 270 N.Y.S. 2d 231 (1966), affirmed without opinion, 27 A D 2d 905 (1st Dept. 1967). The lower court in *Cosme* held that legal counsel was not required at a guidance conference and stated (270 N.Y.S. 2d at p. 232):

> "These hearings are simple interviews or conferences which include school officials and the child's parents. Further, they are purely administrative in nature, and are never punitive. The parents are fully apprised of all of the facts and are furnished with copies of all information in respondent's possession."

By constitutional standards of due process there is no right to an attorney at the conference. By simpler standards of policy there is no need for an attorney at the conference. The school system of New York City has many problems—some of them severe—but it does not follow that the solutions will come by extending the right

of counsel into areas of educational planning regarding the best method of dealing with and providing an education for a child with a behavioral problem. School officials can be held to account for any unlawful decisions they may make or unlawful practices they may adopt, but the day to day operations of the schools should not be conducted as quasi-judicial proceedings. The work of the schools must continue. Individual rights must be protected. The present system affords a constitutional and practical balance of the interests of both. Thus there is no need for a further review of this case. The Court of Appeals for the Second Circuit carefully considered each of petitioners' contentions and held that the present practice does not deprive students or their parents of due process of law. Petitioners have failed to show any error in the analysis of the Circuit Court which would warrant granting a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

April 5, 1968.

Respectfully submitted,

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